

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

RETENTION BY BROADCASTERS OF
PROGRAM RECORDINGS

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)

MB Docket No. 04-232

To: The Commission

COMMENTS

On behalf of the following licensee entities:

Alaska Broadcast Communications, Inc.
Brooke Communications, Inc.
BDI Broadcasting, Inc.
BG Broadcasting, Inc.
BL Broadcasting, Inc.
Charles River Broadcasting WCRB License Corp.
Charles River Broadcasting WCRI License Corp.
Charles River Broadcasting WFCC License Corp.
Charles River Broadcasting WJFF License Corp.
Charles River Broadcasting WKPE License Corp.
Gore-Overgaard Broadcasting, Inc.
KIMM Radio, Inc.
Monarch Broadcasting, Inc.
Nebraska Rural Radio Association
Panhandle Broadcasting, Inc.
Paul Bunyan Broadcasting Co.
West Point Broadcasting, Inc.

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SUMMARY

Garvey Schubert Barer, on behalf of 17 commercial radio station licensees and 43 stations, opposes the FCC's proposal to require broadcasters to record and retain programs for 60 to 90 days. The requirement will have an unconstitutional chilling effect on speech, as found by the D.C. Circuit Court of Appeals in 1978 which struck down a similar audio taping requirement.

Very few programs generate indecency complaints when viewed in the context of all the broadcast programming available in the United States. More than 18,000 broadcast stations air 105,120,000 program-hours on a cumulative basis between 6:00 a.m. and 10:00 p.m. in a year. Indecency complaints, however, have been filed against an average of 238 broadcast programs per year, with the indecent matter usually confined to a few minutes within those programs. Imposing a recording requirement on all broadcasters for such a small fraction of a percentage of offending programs would be unnecessary, arbitrary and capricious.

The cost of equipment plus implementing and overseeing recording of programs 365 days a year would be burdensome on small broadcasters. Moreover, the duplication and distribution of copies would violate the Copyright Act and would require broadcasters to violate program agreements with third party suppliers.

If the FCC adopts a program retention requirement, the rule should apply only in limited circumstances, and only if the FCC obtains additional safeguards to protect broadcasters from liability for copyright infringement and contract breach. The requirement should be used solely as a sanction against stations found to have violated

the indecency statute. Exemptions from the recording requirement should be available to small market broadcasters and to small business broadcasters wherever located. Stations should be able to avoid the program retention rule by certifying they do not air a format likely to include indecent programming or by certifying that particular program segments are supplied by third parties, such as syndicated programs, when it makes no sense to have hundreds of stations recording the same programming.

The Commission should seek an exemption for broadcasters from Copyright law. Otherwise, broadcasters will have to obtain additional licenses from copyright owners in order to make the recordings without committing copyright infringement. In addition, the FCC should restrict public access to the recordings so that the distribution of copyrighted materials will be limited to the government. Further, the recording requirement should be limited to materials created and aired on the local station so that third party programming agreements will not be breached.

Owing to the constitutional implications surrounding the proposed rule, it must be narrowly tailored to warrant imposing the burden and to target the specific governmental interest it is trying to protect. The rule, if adopted, must be used only for indecency enforcement, and not for other content-related inquiries. The fact that recordings exist and can be demanded by the government provides too great a temptation for those recordings to be used for unconstitutional purposes. Indeed, the FCC should resist that temptation altogether, and not impose a recording requirement.

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COMMENTS

Extreme remedies are very appropriate for extreme diseases.
-- Hippocrates

Garvey Schubert Barer ("GSB"), on behalf of certain commercial broadcast licensees it represents before the Commission,¹ herewith submits comments on the Notice

¹ The following broadcast licensees support these comments:

- Alaska Broadcast Communications, Inc., licensee of KGTW(FM), Ketchikan, AK, KIFW(AM), Sitka, AK, KJNO(AM), Juneau, AK, KSBZ(FM), Sitka, AK, KTKN(AM), Ketchikan, AK, and KTKU(FM), Juneau, AK;
- Brooke Communications, Inc., licensee of KQEN(AM), Roseburg, OR, KRSB-FM, Roseburg, OR, KKMx(FM), Tri City, OR, and KAVJ(FM), Sutherlin, OR;
- BDI Broadcasting, Inc., licensee of KIKV-FM, Sauk Centre, MN, and KULO(FM), Alexandria, MN;
- BG Broadcasting, Inc., licensee of KKZY(FM), Bemidji, MN, and KLLZ-FM, Walker, MN;
- BL Broadcasting, Inc., licensee of KBLB(FM), Nisswa, MN, KKWS(FM), Wadena, MN, KLIZ(AM), Brainerd, MN, KLIZ-FM, Brainerd, MN, KNSP(AM), Staples, MN, KUAL-FM, Brainerd, MN, KVBR(AM), Brainerd, MN, KWAD(AM), Wadena, MN, and WJJY-FM, Brainerd, MN;
- Charles River Broadcasting WCRB License Corp., licensee of WCRB(FM), Waltham, MA;
- Charles River Broadcasting WCRI License Corp., licensee of WCRI(FM), Block Island, RI;
- Charles River Broadcasting WFCC License Corp., licensee of WFCC-FM, Chatham, MA;
- Charles River Broadcasting WJJF License Corp., licensee of WCNX(AM), Hope Valley, RI;
- Charles River Broadcasting WKPE License Corp., licensee of WKPE-FM, Orleans, MA;

(continued....)

of Proposed Rulemaking ("NPRM"), released July 7, 2004, in the above-captioned matter.²

The NPRM invites comment on a proposed rule that would require each broadcast station to record all programs broadcast between 6:00 a.m. and 10:00 p.m. each day, and to retain those recordings for a period of 60 or 90 days. These comments oppose the imposition of such requirements.

I. Overview.

GSB is sympathetic to the plight of both the Commission and the public regarding the broadcast of indecent matter, investigation of complaints regarding such broadcasts, and enforcement of the statute prohibiting the broadcast of obscene, indecent or profane language. At the same time, however, the remedy should treat the malady, not injure the patient. A requirement for the nation's more than 18,000 radio and television stations³ to

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- Gore-Overgaard Broadcasting, Inc., licensee of WROD(AM), Daytona Beach, FL, KBIF(AM), Fresno, CA, and KIRV(AM), Fresno, CA;
- KIMM Radio, Inc., licensee of KIMM(AM), Rapid City, ND;
- Monarch Broadcasting, Inc., licensee of KWHW(AM), Altus, OK, KRKZ(FM), Altus, OK, and KQTZ(FM), Hobart, OK;
- Nebraska Rural Radio Association, licensee of KRVN(AM) and KRVN-FM, Lexington, NE;
- Panhandle Broadcasting, Inc., licensee of KNEB(AM) and KNEB-FM, Scottsbluff, NE;
- Paul Bunyan Broadcasting Co., licensee of KBHP(FM), Bemidji, MN, and KBUN(AM), Bemidji, MN; and
- West Point Broadcasting, Inc., licensee of KTIC(AM) and KWPN-FM, West Point, NE.

² The deadline for filing comments was extended to August 27, 2004, by *Order*, 19 FCC Rcd. 13323, released July 22, 2004.

³ Broadcast station totals as of June 30, 2004, were 4,771 AM stations, 6,218 commercial FM stations, 2,497 noncommercial FM stations, 1,366 commercial TV stations, 382 noncommercial TV stations, and 2,727 low power TV and Class A TV stations, totaling 17,960 broadcast stations that would be subject to the program recording requirement. *FCC News, Broadcast Station Totals As Of June 30, 2004*, released August 20, 2004. The New release does not include low power FM station totals, but a search of the FCC's web site (<http://www.fcc.gov/mb/audio/lpfm/index.html>) listed 280 licensed LPFM stations.

record all programming between 6:00 a.m. and 10:00 p.m. is disproportionate in the extreme. Indeed, it may be unconstitutional unless the remedy is narrowly tailored to fit the harm.

As set forth in greater detail below, it is respectfully submitted that the Commission cannot impose recording and retention requirements on broadcasters because it would have an unconstitutional chilling effect on speech. With the very limited number of programs that generate indecency complaints when viewed in the context of all the broadcast programming available in the United States, imposing the requirement on all broadcasters would be arbitrary and capricious.

The cost of equipment plus implementing and overseeing recording of programs 365 days a year would be burdensome on small broadcasters. Moreover, the duplication and distribution of copies would violate the Copyright Act and would require broadcasters to violate program agreements with third party suppliers.

If such a rule were adopted, the FCC should impose the requirement only as a sanction against stations found to have violated the indecency statute. Exemptions from the recording requirement should be available to (i) small market broadcasters, (ii) small business broadcasters wherever located, (iii) stations that certify they do not provide a format conducive to indecent programming, and (iv) stations for particular time periods during which they offer programming provided by third parties, such as syndicated programs.

The Commission should seek an exemption for broadcasters from the Copyright law so that broadcasters will not have to obtain additional clearances from owners of copyrights in the music and programs to make the recordings. It should also restrict

public access to the recordings so that the distribution of copyrighted materials will be limited to the government. Further, the recording requirement should be limited to materials created and aired on the local station so that third-party programming contracts will not be breached.

A program recording and retention rule must be narrowly tailored to warrant imposing the burden and to target the specific governmental interest it is intended to protect. For the vast majority of stations across the country, indecency is not an issue or a temptation. They have no intention of exposing their audiences, which are the best arbiters of their content, to indecent programming. The vast majority should not be punished for the crimes of a few broadcasters who cross that line.

II. The Proposed Program Recording and Retention Requirements Would Be Unconstitutional.

As a threshold matter, the FCC must evaluate whether imposing a recording requirement is constitutional. In *Community-Service Broadcasting of Mid-America v. FCC*,⁴ the United States Court of Appeals for the District of Columbia Circuit struck down a provision of the Communications Act that required noncommercial stations to retain audio programs for 60 days. The Court held that such a requirement violated the First Amendment rights of public broadcasters and potentially chilled the rights of all broadcasters:

In this case the spectre of government censorship and control hovers, not only over public broadcasting, but over all broadcasting. For if this legislation is constitutional as to public broadcasting, similar legislation as to all broadcasting is waiting in the wings. If the Government can require

⁴ 593 F.2d 1102 (D.C. Cir. 1978). In that case, the court struck down the requirement that noncommercial stations receiving federal funding make audio tapes of broadcasts in which any issue of public importance was discussed, retain the tapes for 60 days, and provide a copy of tapes upon request to the FCC and to any member of the public.

the most pervasive and effective information medium in the history of this country to make tapes of its broadcasting for possible government inspection, in its own self-interest that medium will trim its sails to abide the prevailing winds.

593 F.2d at 1123.

The NPRM suggested the primary purpose of imposing a recording requirement on broadcasters is to assist with the review of indecency complaints, but it recognized multiple uses for such recordings, including compliance review of children's commercial television limits and sponsorship identification. NRPM, ¶ 7. Armed with such recordings, however, the FCC could find itself pressured to review areas of programming that are constitutionally protected. A broadcaster's program retention library would be an inviting target for citizen complaints about controversial programming, such as alleged bias in news coverage, personal attacks, political editorializing,⁵ or views expressed during conservative or liberal talk shows. The fact that the government could require program recording and obtain copies at will would put a chill on broadcasters' willingness to air potentially controversial or fringe programming, and thereby diminish the variety of programming available to the public.⁶

The FCC, however, does not need to take the overly broad approach of having all broadcasters record and retain programs for 60 - 90 days in order to review complaints against a limited number of broadcasters. It already has enforcement mechanisms in

⁵ *Radio-Television News Directors Association v. FCC*, 229 F.3d 269, 269 (D.C. Cir. 2000) (quoting *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872 (D.C. Cir. 1999), "the court did . . . acknowledge that [the personal attack and political editorial] rules 'interfere with editorial judgment of professional journalists and entangle the government in day-to-day operations of media,' *id.* at 881, and 'chill at least some speech, and impose at least some burdens on activities at the heart of the First Amendment.' *Id.* at 887.").

⁶ See *Syracuse Peace Council v. FCC*, 867 F.2d 654, 663 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990) (in upholding the FCC's decision to repeal the fairness doctrine because of its chilling impact on
(continued....)

place sufficient to enforce its rules in virtually all cases. Imposing program recording requirements on all broadcasters is like using a sledge hammer to squash a flea – it is an overly broad enforcement mechanism to assist the FCC with a small minority of offenders. Combined with the temptation to use recordings for other purposes, the remedy is neither proportionate nor narrowly designed to address the government’s interest.

**III. The Proposed Program Retention Requirements are
Unnecessary and would be Arbitrary and Capricious.**

The proposed requirements are designed to “enhance” the FCC’s power to enforce its indecency policy and “improve the adjudication of complaints.” By the Commission’s own account, however, only approximately 1% of complaints are currently dismissed for lack of a tape, transcript or significant excerpt. *See* NPRM, Note 8 (of 14,379 complaints filed between 2000 and 2002, only 169 complaints (1.18%) were dismissed for lack of a tape, transcript or excerpt).

In addition to the small number of complaints that were dismissed for lack of a tape, transcript, or excerpt, the FCC’s own statistics from its web page⁷ show the small number of programs subject to complaints and the limited number of Notices of Apparent Liability issued by year. The figures in the following table exclude data regarding complaints against cable programs.

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controversial speech, the court recognized that “[t]he fairness doctrine applies to ordinary mortals who adjust their affairs on the basis of estimates of risk.”).

⁷ <http://www.fcc.gov/eb/broadcast/ichart.pdf>.

Calendar Year	# of TV and Radio Programs which Attracted Complaints	# of NALs
2004 (part year data)	124	7
2003	339	3
2002	351	7
2001	146	7
2000	110	7
Total:	1070	31

Considering there are more than 18,000 broadcast stations airing collectively more than 105,120,000⁸ hours of programming during the year, and the fact that there have been only 1,070 programs (some of which may have been only minutes in duration) that have drawn complaints warranting only 31 Notices of Apparent Liability in the last four and one-half years, the FCC wants 18,000-plus broadcasters to record 16 hours a day each day of the year because of roughly seven offending programs a year. Assuming those offending programs were an hour long, they represent only a miniscule fraction of a percentage of the more than 105,120,000 program-hours broadcast during the year. Thus, even if the recording requirements did not infringe First Amendment rights and impose significant costs on broadcasters, the requirements would only marginally advance the Commission's regulatory goals.

**IV. The Proposed Requirements Impose
Significant Burdens on all Broadcasters.**

The proposed rule would apply to all broadcasters, regardless of their ability to afford such burdens, or the likelihood that they will violate the indecency statute. These burdens are particularly severe for non-group-owned stations and smaller market stations

⁸ 16 hours per day (6 a.m. to 10 p.m.) times 365 days per year times 18,000 stations.

where the costs of recording and storing copies of programs cannot readily be recovered as a business expense. Nor can they obtain group or volume discounts from equipment vendors.

The Commission has already received comments in this proceeding outlining hardware, maintenance, and staff costs. *See, e.g.*, Comments of S-R Broadcasting, Co., Inc., filed July 23, 2004, Burbach of DE, LLC, filed July 21, 2004, and Meredith C. Beal for Lasting Value, filed July 29, 2004. According to those comments, the initial costs range from a low of \$1,500 to over \$10,000 per station. Money spent to record and store programs now may take away from savings of small broadcasters who are planning to upgrade to digital facilities and delay the day when they can provide high definition radio services.

For analog storage, the ongoing costs of tapes and tape storage plus personnel available to change the tapes when a station may be unattended and automated for evening and weekend operation does not make this an attractive option. Recording and storage, however, raise another set of potential costs and liabilities, which become even more complicated in connection with digital recordings.

V. The Proposed Rule Would Encourage Copyright Infringement.

Under Section 112 of the Copyright Act, 17 U.S.C. § 112, broadcasters may make no more than one copy of a digital sound recording. No further copies may be made from that one digital copy and that copy can be made only for archival preservation for transmission within the station's service area. 17 U.S.C. §§ 112(a)(1)(A) & (B). As the purpose for which the FCC would require retention of programs and transmission to the FCC and members of the public does not fall within a statutory license for use of digital

sound recordings,⁹ broadcasters would need to seek the permission of each and every owner of the copyright in the digital sound recording in order to transmit a copy of each digitally-copied song to the FCC. Permission from owners of the copyright in the underlying musical work (composers and songwriters and/or their publishers) would also need to be sought for *both* analog and digital copying, because the blanket licenses obtained from ASCAP, BMI, and SESAC do not cover copying of songs for third parties.¹⁰

It is impractical to require broadcasters to seek out the owners of various different copyrights in each song and program that is played on the air and recorded to comply with the proposed rule. No central clearinghouse exists to secure those permissions. It is also highly unlikely that more than 18,000 broadcasters would or could undertake such a task.¹¹ Compliance with the FCC's rule, therefore, would aid and abet copyright infringement.

⁹ Statutory licenses are available under Section 114(f) of the Copyright Act, and apply in the context of streaming music on the Internet. To obtain the statutory license, the transmission service (e.g., the broadcaster) must file a Notice of Use with the Copyright Office in Washington, DC, pay monthly royalties to SoundExchange, keep the required records to file quarterly Reports of Use with SoundExchange, and abide by the programming restrictions described as the "sound recording performance complement" in Section 114(j)(13) of the Copyright Act. The sound recording performance complement means, during a three hour period, the service may not play more than three songs from a particular album and no more than two consecutively, or four songs by a particular artist or from a boxed set, including no more than three consecutively. Repeats of a program are limited to three times in a two-week period for programs under one hour in duration, or four times in a two-week period for programs over one hour. 37 U.S.C. § 114(j)(13).

¹⁰ For example, the BMI license gives the broadcaster the right to publicly perform the copyrighted song over-the-air or to stream the over-the-air signal on the Internet and specifically prohibits reproduction of the musical composition by any means. See BMI License Agreement, ¶¶ 3.A, B & E, at http://www.bmi.com/licensing/forms/2003_radio_license.pdf.

¹¹ Digital encryption techniques to disable copying will most likely in the future further encumber broadcasters' ability to copy songs and programs easily. Section 112(a)(2) of the Copyright Act requires the copyright owner to make available the means to disable the technical measures preventing copying by an entity entitled to reproduce a work "if it is technologically feasible and economically feasible for the copyright owner to do so." 37 U.S.C. § 112(a)(2). A broadcaster encountering copy protection on a song or program will have to take yet more time-consuming and technically-complicated steps in each such instance in order to copy the song or program.

The FCC should seek the opinion of the General Counsel of the Copyright Office to determine whether recording and distributing copyrighted works for the purposes set forth in the NPRM would be exempt from the Copyright laws. Failing that, the FCC may need to seek a legislative change to permit such copying. Section 506(a)(2) of the Copyright Act makes copyright infringement – by reproduction or distribution of even one copy of a copyrighted work – a criminal violation. 37 U.S.C. § 506(a)(2). The FCC should not through regulation force a licensee to commit a criminal act.

VI. Compliance with the Proposed Rule Would Interfere with Contracts.

Many programming agreements prohibit recording of their programs. For instance, one fairly typical live sports network agreement, in this instance college football, contains the provision that the radio “Station agrees not to allow any broadcast which is supplied to Station by Network to be used for any purposes other than live broadcasting, on-air promotion, or actuality use on Station’s sports reports.” A well-known sports Radio Network Affiliation Agreement provides that:

Except for [. . .] programs which we feed to your station with the express understanding that you may tape them for subsequent broadcast, you agree not to authorize, cause, permit or enable anything to be done whereby a tape (other than a logger tape) is made or a recording is broadcast, of a program which has been or is being broadcast on our network.¹²

Yet another agreement for a customized oldies music format provides that:

Broadcaster shall not license, sublease, use, or in any other manner transfer or permit the use of the Programming, or any part thereof, by any other station or stations, nor copy nor permit anyone else to copy the Programming provided by any means, including but not limited to those services conveyed by way of audio tape, compact disc, data print-out,

¹² Virtually identical language can be found in a non-sports entertainment programming agreement for a nationally syndicated host.

digital or analog transmission, telephone consultation and/or printed or written materials.

Recording those programs to supply them to the FCC or to members of the public to hear or view the recording would be a breach of those contracts.

An agreement to broadcast hockey games includes a similar provision:

The Program, and all rights therein, including its title, are the exclusive property of [. . .] and is intended for broadcast only as specified in this Agreement. Any other use of the Program, in whole or in part, without the express written consent of [. . .], is strictly prohibited.

Obtaining express written consent from program suppliers, which consent they could withhold in their sole discretion, adds to the burdens of complying with the proposed recording rule. If the program supplier refused to consent to the recording and distribution of the program to the FCC or to a member of the public seeking to obtain a copy of the program in connection with an indecency complaint, the broadcaster would be placed in the untenable position of choosing to breach multiple agreements or violate an FCC rule.

**VII. If the Proposed Rule is Adopted, the
Commission Should Limit its Application.**

Assuming the FCC can overcome the constitutional hurdles to justify abridgement of the First Amendment because an overriding governmental interest necessitates such regulation, and assuming the FCC can secure an exemption from the copyright laws and third-party contract provisions, the FCC should restrict its application of the rule and limit access to those recordings. The following factors should govern the Commission's consideration of the proposed retention requirement:

- Narrow tailoring of the requirement to limit chilling effects.
- Costs of compliance with a program recording and retention rule.

- Licensee exposure to copyright and contract liability and to public demands for copies of programs.
- Bases for exemption from a program recording and retention rule.
 - First offender.
 - Market size.
 - Business size.
 - Source of program origination and format.

The FCC can and should limit the breadth of such a broad-based recording requirement.

A. Design the requirement as a "strike two" proposal. A station would be required to record only after it first was found to have violated the indecency statute.

A more rational approach would be to impose a program retention requirement only on stations that repeatedly violate the indecency rules. Given the overwhelming number of stations that have never received an indecency complaint, imposing program recording obligations as a sanction against those found to have violated the indecency statute would target only those broadcasters who have a proclivity to violate the indecency standards. In contrast, the NPRM proposal penalizes the vast majority of stations that comply with the indecency standards.

B. Make clear that the recorded programs will be available only to the FCC for purposes of enforcing its indecency regulations.

While it is natural for broadcasters to fear that members of the public will impose demands for copies of programs, whether for purposes of complaint to the FCC or because they simply might want a copy of the program for their own purposes, distribution of copies of copyrighted works to the public would violate the copyright laws or require broadcasters to secure clearances for all the various copyrights contained in a particular recording. Many small broadcasters do not have the personnel available to

handle and field those public demands and to secure copyright licenses. The FCC may be more likely to secure an exemption from the copyright laws if copies of those works are not available for distribution to the public. Moreover, restricting public access to copies of recordings of programs aired pursuant to programming agreements would avoid additional liability for breach of contract and obviate the need to secure program suppliers' consents and contract waivers.

The FCC's use of recorded programs, if used at all, must also be restricted to indecency enforcement. No basis exists for using the tapes for other enforcement activities, such as review of sponsorship identification, where the governmental interest is different from the rationale underpinning the curb on the First Amendment to enforce the indecency statute. Using tapes for myriad content-review purposes would chill speech, as broadcasters would not want to risk the potential for government scrutiny – a scrutiny that might change at the whim of public opinion and government officials.

C. Protect broadcast stations from liability incurred by copying copyrighted material and syndicated programs in order to comply with the rule.

Another approach would be for the FCC to work with the Copyright Office and Congress if necessary to secure an exemption from the copyright laws so that broadcasters will not incur liability for complying with the proposed rule. Such a solution would be needed even if the FCC modified the rule to apply the requirement only as a sanction for repeat indecency offenders. Indecency violators should not also become copyright infringers.

Further, broadcasters should not be required to copy programs that come from third party suppliers. Most programming agreements prohibit the use of their programs

for any purpose other than the broadcast of the program on the station. Particularly in the case of syndicated programs, which in many cases are aired over hundreds of stations (and simultaneously in the case of live events and sports programs), there is no reason to require that every single station copy all the programs being copied by every other station that airs the same program.

Given that a station would be recording 960 hours of programming during a 60-day period and 1,440 hours of programming during a 90-day period, the burden of securing permissions from copyright owners and express written consents from program suppliers to waive contract provisions that prohibit copying would be burdensome in the extreme, even as a sanction. Where copyright licenses or contract waivers are not secured, the stations would be at risk for copyright infringement and contract breach. The Commission needs to find some method to protect broadcasters from that risk. One way would be to impose recording requirements only on programs the station originates locally that do not include content supplied by third parties.

D. Limit the application of the rule to broadcast stations most able to assume the burden.

Small market broadcasters, and even small broadcasters in large markets who do not operate a cluster of stations, have neither the resources nor the economies of scale that large-market, large station-group-owners have to comply with the costs associated with copying 16 hours of programs per day and storing between 960 and 1,440 hours of

recordings. The Commission should exempt non-top 50 market stations and broadcasters who meet the definition of a small business.¹³

Exemptions for small broadcasters is not without precedent. The FCC has recognized the burdens of compliance in other areas of its regulations, such as with its EEO rule, where stations with fewer than five full-time employees or stations in markets with fewer than 250,000 population, have fewer burdens placed on them. 47 C.F.R. § 73.2080. Thus, implementing exemptions based on station size and market size merits varying levels of compliance.

E. Exempt stations based on program sources and formats.

If the FCC must tread on the First Amendment, as it does to protect children in enforcing the indecency statute, the FCC is already regulating content. To narrow the proposed rule most effectively, the FCC should apply the rule only to stations whose formats and programs are the most likely to include indecent programming. For example, stations that target an elderly audience with a “Music of Your Life” format are not likely to air indecent programs. Their audiences would not tolerate it. Stations with business radio formats, agricultural formats, or classical music formats are unlikely to air objectionable programs. Those stations should not be burdened with a recording requirement.

Recording requirements can also be limited with respect to time periods based on the source and content of programs. If a station pre-records voice tracks of short announcements of the artist and song title for the evening and weekend hours or for

¹³ The Small Business Administration defines a radio station with \$5,000,000 or less in annual receipts and a television station with \$12,000,000 or less in annual receipts as a small business. NPRM App. A, ¶¶ 5-6.

particular shifts, it should not have to save those recordings if the music format is not susceptible to indecent lyrics. Voice tracks do not include sudden outbursts of objectionable words.

If the programming comes from a regional or national source, the local outlet should not also have to record the program. As mentioned previously, the FCC does not need hundreds of stations taping the same material.

The FCC could require the station to certify that its program format, or specific segment or time period of its programming, is not susceptible to containing indecent material, or segments that are supplied from a third party source. Those stations should be allowed to claim an exemption from the recording requirements either for their entire broadcast or portions of their broadcasts. A certification could be treated as a rebuttable presumption. A certifying station would be exempt from the recording retention requirement as set forth in its certification, unless the presumption were overcome by evidence to the contrary.

F. Require that indecency complaints be filed during the period for which programs are recorded.

If the FCC imposes some form of recording and retention of programs rule, it will need to modify its procedures for handling indecency complaints to enable recordings to be sent to the Commission within the 60 or 90 day window the FCC adopts. It will do no good if the FCC entertains complaints filed after that window if the broadcaster no longer has the program recording to provide.

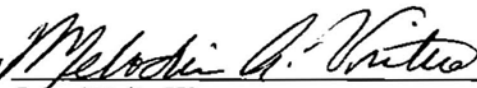
XIII. Conclusion.

Requiring more than 18,000 broadcasters to record 16 hours per day and retain recordings for 60 – 90 days is an extreme remedy for the 1.18% of complaints dismissed for lack of a tape, transcript or excerpt. It is an extreme remedy to require broadcasters nationwide to record 105,120,000 hours of programs a year for the average 238 broadcast programs per year that have drawn a complaint over the past four and one-half years, and where only an average of seven programs per year have warranted Notices of Apparent Liability. With the chilling effect on free speech that the courts recognize such recording will cause, the FCC must abandon the idea. To proceed would require a complex set of exemptions to target narrowly the goal of the rule, and even with such exemptions, the FCC must obtain protection for broadcasters so as not to induce copyright infringement and contract breaches. Simply put, the proposed rule is a bad idea when the effort and effect of such a rule are examined. As a result, the Commission should decide against adopting the rule.

Respectfully submitted,

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